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A Tale of Two Cities: Is Lozano v. City of Hazelton the Judicial Epilogue to the Story of Local Immigration Regulation in Beaufort County, South Carolina

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**A TALE OF TWO CITIES:
IS *LOZANO V. CITY OF HAZLETON* THE JUDICIAL EPILOGUE TO THE
STORY OF LOCAL IMMIGRATION REGULATION IN BEAUFORT
COUNTY, SOUTH CAROLINA?**

“Immigration is a national issue.”¹—District Judge Munley, writing in *Lozano v. City of Hazleton*

“I could no longer wait for the federal government to do anything. . . . Illegal immigration is not a federal problem. It is a local issue. We deal with it every single day.”²—Louis Barletta, Mayor of Hazleton, Pennsylvania

“When the federal government drops the ball on enforcing immigration laws, it’s up to the local governments to protect the taxpayers.”³—Starletta Hairston, former member of the Beaufort County Council (South Carolina)

I. INTRODUCTION

It was the best of times. Having moved to Hilton Head only four years prior, Starletta and William Hairston’s self-created stucco business had earned nearly \$1 million in 1997.⁴ The Hairstons were investing in real estate, expanding their business, and breaking ground on what was to be their 7,600-square-foot mansion.⁵ Yet it soon became the worst of times—Hairston began losing bids on stucco jobs, and his business started to decline.⁶ The cause? Underbidding by competitor companies, many of which employed or were operated by illegal immigrants.⁷ Many of these workers, and even some of the business owners themselves, were immigrants that at one time had worked for William Hairston; the workers who had helped build Hairston’s fortune were now chipping away at his financial fortress, and it ultimately collapsed in 2002 when he was forced to close his Hilton Head business.⁸

Current estimates for the number of illegal immigrants now living in the United States range from 8 million to as many as 12 million.⁹ As the numbers grow,¹⁰ so

1. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 523 (M.D. Pa. 2007).

2. JUDICIAL WATCH, LOCAL GOVERNMENTS AND ILLEGAL IMMIGRATION 5 (2007), http://www.judicialwatch.org/archive/2007/SR_Immigration.pdf.

3. Fred Lucas, *Feds Have Dropped Ball on Illegal Immigration, Say Local Governments*, CYBERCAST NEWS SERVICE, Mar. 1, 2007, <http://www.cnsnews.com/Politics/Archive/200703/POL20070301a.html>.

4. See Miriam Jordan, *Trading Places: How Immigration Upended Dreams of an Entrepreneur*, WALL ST. J., Dec. 13, 2006, at A1.

5. *Id.*

6. *Id.*

7. See *id.* Hairston and other subcontractors allege that under-the-table payments to illegal immigrant workers save companies money in payroll taxes and worker’s compensation costs, which in turn allows the contractor to bid a lower price. See *id.*

8. *Id.*

9. 151 Cong. Rec. S7852 (daily ed. Jun. 30, 2005) (statement of Sen. Sessions). Some research groups estimate as many as 12 to 38 million immigrants. See, e.g., Brad Knickerbocker, *Illegal in the US: Just How Many?*, CHRISTIAN SCIENCE MONITOR, May 16, 2006, at 1 (“Depending on the source,

do the calls for a legislative response to the burgeoning problem of illegal immigration. The inability of the federal government to address the problem has prompted numerous state and local officials to try their own hand at regulating immigration.¹¹ According to the National Conference of State Legislatures, over 1,404 pieces of legislation dealing with immigration have been introduced across the fifty states since January 2007, with 170 bills becoming law in forty-one different states.¹² The regulations range from proscriptions on residential leasing to illegal immigrants and penalties for businesses that employ illegal aliens to English-only ordinances.¹³

These small-town answers to the national immigration question have not gone unnoticed nor have they been met with universal acceptance. Various organizations and special interest groups have sued the municipalities over the validity and constitutionality of the newly enacted laws.¹⁴ The most notable challenge to a local immigration ordinance has come in the small town of Hazleton, Pennsylvania.¹⁵

the numbers [of illegal immigrants living in the country] range widely—from about 7 million up to 20 million or more.”); Julie Mason, *Immigration Strategies Taking Shape*, HOUS. CHRON., Oct. 5, 2007, at A9, available at <http://www.chron.com/disp/story.mpl/metropolitan/masou/5189638.html> (“Californians for Population Stabilization released a study claiming there are 20 million to 38 million illegal immigrants in America, not the 12 million the federal government says.”).

10. See Rick Lyman, *New Data Shows Immigrants’ Growth and Reach*, N.Y. TIMES, Aug. 15, 2006, at A1 (noting that the number of immigrants living in American households rose sixteen percent between 2001 and 2006).

11. See Linda Kaiser Conley & Ilan Rosenberg, *The Eye of The Storm*, PA. LAW., Nov./Dec. 2007, at 34, 35; Jonathan Weisman, *Immigration Bill Dies in Senate*, WASH. POST, June 29, 2007, at A1 (“The most dramatic overhaul of the nation’s immigration laws in a generation was crushed yesterday in the Senate.”); Yvonne M. Wenger, *Could S.C. Lead Reform?*, POST & COURIER (Charleston, S.C.), Oct. 5, 2007, at 1A (noting the rise of state legislation regarding immigration reform in the wake of failures for national proposals).

12. See DIRK HEGEN, NAT’L CONFERENCE OF STATE LEGISLATURES, 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION (2007), <http://www.ncsl.org/programs/immig/2007ImmigrationUpdate.htm> (“In the continued absence of a comprehensive federal reform of the United States’ challenged immigration system, states have displayed an unprecedented level of activity—and have developed a variety of their own approaches and different solutions.”). Another national immigration policy group has noted, “In fewer than six months, over 90 U.S. local governments have introduced, passed, or considered introduction of 105 ordinances that target hard-working immigrants and their children.” FAIR IMMIGRATION REFORM MOVEMENT, HISTORY OF THE PUSH FOR LOCAL ANTI-IMMIGRANT ORDINANCES, <http://fairimmigration.org/learn/immigration-reform-and-immigrants/local-level/history.html> (last visited Feb. 24, 2008).

13. See Matthew Parlow, *A Localist’s Case for Decentralizing Immigration Policy*, 84 DENV. U. L. REV. 1061, 1064 (2007) (categorizing the common types of local immigration ordinances as “employment, day laborer, housing, and English-only”).

14. See Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at A1 (noting that many local immigration ordinances nationwide “have come under legal assault” by the ACLU and immigration groups).

15. See Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DENV. U. L. REV. 1041, 1041 (2007) (“[T]he City of Hazleton, Pennsylvania has gained the most notoriety for passing a local immigration restriction ordinance . . .”). In addition to Hazleton, litigation continues to headline the news in Valley Park, Missouri; Farmers Branch, Texas; Riverside, New Jersey; and Escondido, California. See *id.* at 1056–60 (summarizing the current litigation over immigration ordinances in Escondido, Riverside, Valley Park, and Farmers Branch); Karin Brulliard, *Immigrant Laws Tread Uncharted Legal Path: With Local, Federal Powers Not Fully Defined, Officials Look to the Courts*, WASH. POST, Aug. 28, 2007, at B1 (noting the litigation taking place in Valley Park and Farmers Branch).

Hazleton has taken center stage for two reasons. First, Hazleton passed several ordinances that imposed fines on landlords who rented to illegal immigrants and suspended business permits of employers who hired illegal immigrants.¹⁶ These ordinances became the model legislation for dozens of similar measures passed by numerous local governments.¹⁷ One such government is Beaufort County, South Carolina, where in the wake of the collapse of her husband's business, Starletta Hairston gathered local support for enacting tougher immigration regulations like those in Hazleton.¹⁸ Second, because of the archetypal nature of Hazleton's efforts, the subsequent litigation regarding the legal validity of its ordinances has been watched closely. On July 26, 2007, the United States District Court for the Middle District of Pennsylvania struck down Hazleton's ordinances.¹⁹ *Lozano* was the first opportunity for the federal judiciary to contribute to the national conversation about immigration reform, and many counties and municipalities clearly heard the district court's opinion of the act that served as the model for local immigration initiatives across the country.²⁰ *Lozano* has sent a message that discourages local efforts to regulate immigration.²¹ In the wake of the decision, many counties and municipalities in South Carolina and across the country face the difficult decision of either abandoning local immigration reforms or possibly defending the ordinances in court.²²

This Note analyzes the court's decision in *Lozano* and compares the ordinances in Hazleton and Beaufort County to determine whether Beaufort County's ordinances would survive a constitutional challenge. Part II provides a brief overview of the history and content of Hazleton's Illegal Immigration Relief Act, followed by a short summary of the district court's opinion in *Lozano* regarding the constitutionality of the Act. This summary focuses particularly on the issues of preemption, due process, and equal protection. Part III examines the context and content of the Beaufort County ordinance, which Starletta Hairston purposely modeled after the Illegal Immigration Relief Act in Hazleton. Part IV further analyzes the Lawful Employment Ordinance in Beaufort County by comparing its language to the employment portion of Hazleton's Illegal Immigration Relief Act to determine whether the Lawful Employment Ordinance would be upheld under the constitutional analysis provided in *Lozano*. Part IV also argues that while the Lawful Employment Ordinance may avoid a challenge on equal protection grounds,

16. See *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 519, 530 (M.D. Pa. 2007).

17. See Conley & Rosenberg, *supra* note 11, at 40 ("More than 100 municipalities across the country have adopted ordinances that are modeled after or are simply carbon copies of Hazleton's.").

18. See Terry Plumb, *Impatience May Drive State, Local Laws*, HERALD (Rock Hill, S.C.), Nov. 26, 2006, at 1E (noting that Beaufort County's proposed ordinance is modeled partially after Hazleton's measures).

19. See *Lozano*, 496 F. Supp. 2d at 555.

20. See Belson, *supra* note 14 (noting that the repeal of a Riverside, New Jersey immigration ordinance was influenced by the *Lozano* decision and that a representative of the Migration Policy Institute predicted that "other towns would follow suit").

21. See Conley & Rosenberg, *supra* note 11, at 39 ("The [*Lozano*] opinion establishes clear precedent that local ordinances designed to supplement or mimic federal immigration laws are not tolerable under the Constitution.").

22. See Campbell, *supra* note 15, at 1046 (noting that citizens and taxpayers will ultimately bear the costs of defending and enforcing local immigration ordinances).

it is susceptible to preemption and due process challenges. Part V concludes the Note, examining the potential lasting impact of *Lozano*.

II. THE CITY OF HAZLETON'S ILLEGAL IMMIGRATION RELIEF ACT OF 2006 AND THE CONSTITUTIONALITY OF THE ILLEGAL IMMIGRATION RELIEF ACT AS DECIDED IN *LOZANO V. CITY OF HAZLETON*

A. *The City of Hazleton's Illegal Immigration Relief Act of 2006*

Like many small towns across the country, the City of Hazleton, Pennsylvania, had waited long enough for Congress to deal with the issue of illegal immigration.²³ Motivated by the perceived burden on Hazleton's social services and the increased criminal activity caused by increasing numbers of "illegal aliens,"²⁴ the Hazleton City Council adopted its first version of the Illegal Immigration Relief Act Ordinance of 2006 (Original Ordinance) on July 13, 2006.²⁵ The Original Ordinance prohibited the employment of unlawful workers and the harboring of undocumented aliens, and made English the official language of the city.²⁶

On August 15, 2006,²⁷ the American Civil Liberties Union (ACLU), along with the Puerto Rican Legal Defense and Education Fund (Puerto Rican Defense Fund), filed an action against the City of Hazleton in the United States District Court for the Middle District of Pennsylvania.²⁸ The complaint sought to permanently enjoin enforcement of the Original Ordinance and to have the Original Ordinance declared

23. See Conley & Rosenberg, *supra* note 11, at 35 (noting that "public frustration with the federal government's failure to enforce border control and to enact immigration reform legislation" led many local governments to attempt to regulate immigration on their own); Carl Hulse & Rachel L. Swarns, *G.O.P. Sets Aside Work on Immigration*, N.Y. TIMES, Sept. 5, 2006, at A18 ("Congressional Republican leaders have all but abandoned a broad overhaul of immigration laws."); David McInerney & Dianne Solis, *Cities Across U.S. Act on Immigration: Municipalities, Tired of Waiting on Congress, Get Proactive on Reforms*, DALLAS MORNING NEWS, May 16, 2007, at 1A, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/051607dntextimmigration.39f93fd.html> (noting that the message to Congress from the multiple states and cities enacting immigration legislation is the following: "If you can't do it, we will.").

24. See Conley & Rosenberg, *supra* note 11, at 35 (noting that the ordinances were strongly supported by Hazleton's mayor, Louis Barletta, who "blam[ed] many of the city's criminal, economic and social ills on 'illegal aliens'").

25. See Hazleton, Pa., Ordinance 2006-10 (July 13, 2006) [hereinafter Original Ordinance], available at <http://www.clearinghouse.wustl.edu/chDocs/public/IM-PA-0001-0003.pdf>.

26. See *id.* §§ 4–6. The Original Ordinance provided, "Any entity . . . that employs, retains, aids or abets illegal aliens or illegal immigration into the United States . . . shall . . . be denied and barred from approval of a business permit, renewal of a business permit, [and] any city contract or grant." *Id.* § 4. The Original Ordinance further prohibited illegal aliens "from leasing or renting property" and all persons from knowingly allowing "an illegal alien to use, rent or lease their property." *Id.* § 5(A). Finally, the Original Ordinance declared that English was the official language of the city, and that "all official city business, forms, documents, [and] signage will be written in English only." *Id.* § 6(A). The city also passed the Tenant Registration Ordinance (Registration Ordinance) on August 15, 2006, which required apartment dwellers to obtain an "occupancy permit" from the City of Hazleton before leasing their apartment. See *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 484 (M.D. Pa. 2007). To receive an occupancy permit, the prospective tenants had to prove that they were legal citizens or lawful residents. *Id.*

27. *Lozano*, 496 F. Supp. 2d at 485.

28. Complaint at 40, *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 3:06-cv-01586-JMM), 2006 WL 4385736.

unconstitutional.²⁹ The court granted a temporary restraining order that prohibited enforcement of the Original Ordinance and another ordinance, the Tenant Registration Ordinance (Registration Ordinance),³⁰ during which time Hazleton passed an amended Illegal Immigration Relief Act Ordinance (IIRA).³¹ The IIRA replaced the Original Ordinance, and the city council hoped that the amendments would satisfy the detractors and encourage the ACLU to dismiss its lawsuit.³² The amendment did neither. The Mayor of Hazleton announced that the city intended to begin enforcing the IIRA on or after November 1, 2006;³³ the ACLU responded by filing a second lawsuit.³⁴

B. The Constitutional Challenges to the IIRA in Lozano v. City of Hazleton

The plaintiffs' second amended complaint in *Lozano* alleged a total of nine causes of action,³⁵ and the court's opinion addressed each of these causes of action in a structured, methodical, and almost pedagogical manner.³⁶ The nine causes of action can be separated into three main categories: (1) federal constitutional issues; (2) federal statutory causes of action;³⁷ and (3) state law causes of action.³⁸ The

29. *Id.* at 3.

30. *Lozano*, 496 F. Supp. 2d at 485.

31. See Hazleton, Pa., Ordinance 2006-18 (Sept. 21, 2006), available at http://www.smalltowndefenders.com/090806/2006-18%20_Illegal%20Alien%20Immigration%20Relief%20Act.pdf. Along with the IIRA, Hazleton also passed the Official English Ordinance (English Ordinance). See Hazleton, Pa., Ordinance 2006-19 (Sep. 9, 2006), available at http://www.smalltowndefenders.com/090806/2006-19%20_Official%20English.pdf. For a general summary of the procedural history of *Lozano* in the initial stages of the lawsuit, see Campbell, *supra* note 15, at 1042–45.

32. See *Lozano*, 496 F. Supp. 2d at 539.

33. Eric L'Heureux Issadore, Note, *Is Immigration Still Exclusively A Federal Power? A Preemption Analysis on Legislation by Hazleton, Pennsylvania Regulating Illegal Immigration*, 52 VILL. L. REV. 331, 335 (2007).

34. *Id.* at 335–36. Just prior to the trial, Hazleton again amended the IIRA by adding a section covering “Implementation and Process.” See Hazleton, Pa., Ordinance 2006-40 (Dec. 28, 2006), available at http://www.prldef.org/Civil/Hazleton/hazleton%20legal%20documents/2006-40%20_IIRA20Implementation%20Amendment_.pdf.

35. Second Amended Complaint at 29, 39, 43, 46–48, 53, 56, 60, *Lozano*, 496 F. Supp. 2d 477 (No. 3:06-cv-01586-JMM).

36. As noted by the court, at issue in the case were only the IIRA and the Registration Ordinance. *Lozano*, 496 F. Supp. 2d at 485. The plaintiffs alleged that the city had used the “litigation as its learning curve,” as the city council continued to amend the IIRA in response to the lawsuits filed by the ACLU. See Second Amended Complaint, *supra* note 35, at 3. However, the court focused its analysis only on the IIRA as it existed at the time of trial rather than on all of the variations of the IIRA. See *Lozano*, 496 F. Supp. 2d at 516 (“[O]ur duty is to address [the] IIRA as it now stands.”). The version of the IIRA examined by the court was Ordinance 2006-18, as amended by Ordinance 2006-40, and Ordinance 2007-6, which the court referred to collectively as the “IIRA” or “Ordinance” throughout the opinion. *Id.* at 485 n.3. The court did not examine the English Ordinance.

37. The fourth and fifth causes of action alleged violations of the Fair Housing Act, 42 U.S.C. §§ 3601–3631 (2000), and 42 U.S.C. § 1981. Second Amended Complaint, *supra* note 35, at 46–47.

38. The sixth cause of action alleged that the IIRA's employment provisions violated Pennsylvania's municipality law. *Id.* at 48. Count seven alleged that the Registration Ordinance violated the Pennsylvania Landlord and Tenant Act of 1951, PA. STAT. ANN. tit. 68, § 250.101 (1994). *Id.* at 53. The ninth cause of action alleged that the ordinances exceeded the legitimate police powers of the city. *Id.* at 60.

court focused most of its efforts on the constitutional critique of the employment provisions of the IIRA.³⁹

Because the analysis of the constitutional issues are most pertinent to the examination of the Beaufort County ordinance, this Note limits its examination to the three main federal constitutional issues addressed in *Lozano*.⁴⁰ First, the plaintiffs alleged that federal law preempted the IIRA under the Supremacy Clause.⁴¹ Second, the plaintiffs alleged that the IIRA violated the Due Process Clause of the Fourteenth Amendment by failing to guarantee those affected a “right to a hearing prior to the deprivation of substantive rights.”⁴² Finally, the plaintiffs averred violations of the Equal Protection Clause of the Fourteenth Amendment because the IIRA “use[d] race and national origin as an overt classification.”⁴³

1. *Preemption of the IIRA Under Federal Immigration Law*

a. *Express Preemption*

The *Lozano* court laid the foundation for its preemption discussion by noting that “[t]he Supremacy clause of the United States Constitution invalidates state laws

39. See *Lozano*, 496 F. Supp. 2d at 518–29, 533–37.

40. The final version of Beaufort County’s Lawful Employment Ordinance models only the employment provisions of the IIRA and does not include the harboring or English-only provisions. See BEAUFORT COUNTY, S.C., CODE § 18-69 (2007). In *Lozano*, the court analyzed the employment provisions of the IIRA primarily in the federal constitutional-issues portion of the opinion. See *Lozano*, 496 F. Supp. 2d at 518–29, 533–37. The court’s examination of the federal statutory causes of action and the state law causes of action both dealt with issues related to the Registration Ordinance. See *id.* at 545–54. This Note focuses primarily on the constitutional issues, because the constitutional analysis of the Hazleton ordinances is most significant in analyzing the viability of the Beaufort County ordinance. Although the plaintiffs did raise a fourth constitutional argument—that the IIRA and Registration Ordinance’s requirements to provide personal identity information was a violation of the Constitution’s right to protection of certain zones of privacy—the court’s examination dealt mostly with the Registration Ordinance and ultimately held that the documents required under the IIRA were not sufficiently defined to render judgment on whether they violated a right to privacy. See *id.* at 544–45.

41. See Second Amended Complaint, *supra* note 35, at 29–39. Specifically, the plaintiffs argued,

The Supremacy Clause mandates that Federal law preempts any state regulation of any area over which Congress has expressly or impliedly exercised exclusive authority or which is constitutionally reserved to the Federal government.

. . . .

The [IIRA] and the . . . Registration Ordinance usurp the Federal government’s exclusive power over immigration and naturalization and its power to regulate foreign affairs.

Id. at 30.

42. *Id.* at 39.

43. *Id.* at 45.

that interfere with or are contrary to federal law.”⁴⁴ This invalidation of state law, otherwise known as preemption, “can be either express or implied.”⁴⁵

The examination of whether the IIRA is expressly preempted begins with federal law. The main federal statute under which the plaintiffs brought their preemption challenge is the Immigration and Reform Control Act of 1986 (IRCA).⁴⁶ IRCA prohibits employers from hiring unauthorized aliens who are not permanent residents of the United States or who are not lawfully authorized to work in the United States.⁴⁷ IRCA creates safeguards to help businesses ensure that no unauthorized workers are employed. One such safeguard requires employers to verify the identity of a new employee, usually through the review of certain documentation provided by the employee.⁴⁸ These documents are listed on the Employee Eligibility Verification Form (I-9 Form) which is distributed by the United States Citizenship and Immigration Services.⁴⁹ The employer must inspect and attest to the required documentation when hiring an employee.⁵⁰ IRCA further requires that an employer who unknowingly hired an unauthorized alien—or an

44. *Lozano*, 496 F. Supp. 2d. at 518 (quoting N.J. Payphone Ass’n v. Town of W. N.Y., 299 F.3d 235 (3d Cir. 2002)) (internal quotation marks omitted). Before discussing the preemption question, the court first assessed each of the plaintiffs’ constitutional standing and concluded that the named plaintiffs, the organizational plaintiffs, and the anonymous plaintiffs—with the exception of two business owners (whose claims lacked redressability)—all had standing. *See id.* at 491, 504. The city challenged the plaintiffs’ prudential standing under the “zone of interests” test articulated by the Third Circuit Court of Appeals. *See id.* at 499–500 (citing *Mariana v. Fisher*, 338 F.3d 189, 205 (3d Cir. 2003)). The city argued that “because the Immigration and Nationality Act (INA) was not designed to protect employers who unlawfully employ[] illegal aliens and landlords who harbor illegal aliens,” the plaintiffs—who were unlawfully employing or harboring illegal aliens—had no standing to raise a challenge based on federal immigration laws. *See id.* at 500–01 (internal quotation marks omitted). The court rejected this argument, however, and found that the plaintiffs’ grievances did “arguably fall within the zone of interests of the statutes at the center of this lawsuit.” *Id.* at 502. Specifically, the court noted the following:

Plaintiffs do not claim that the application or interpretation of a law by some state or local agency to which they have no connection is inappropriate but instead claim that their legal rights are violated by a legislative enactment aimed directly at the operation of their businesses or their ability to work or rent property in the City of Hazelton.

Id.

In what is perhaps the most strongly worded portion of the opinion, the district court responded to the city’s argument that the tenant plaintiffs lacked standing “because they [did] not have authorization to reside in the United States and [had] not suffered an injury for which they could gain relief.” *Id.* at 498. The court characterized this reasoning as a “species of argument often heard in recent discussions of the national immigration issue.” *Id.* The court responded to this argument by stating that the “Supreme Court has consistently interpreted [the Fourteenth Amendment’s Due Process Clause] to apply to all people present in the United States, whether they were born here, immigrated here through legal means, or violated federal law to enter the country.” *Id.* at 498–99. The court stated unequivocally, “We cannot say clearly enough that persons who enter this country without legal authorization are not stripped immediately of all their rights because of this single illegal act.” *Id.* at 498.

45. *Id.* at 518 (citing *Olde Discount Corp. v. Tupman*, 1 F.3d 202, 216 (3d Cir. 1993)).

46. *See id.* For the court’s discussion of the history of IRCA entitled “History of Immigration Regulation in America,” see *Lozano*, 496 F. Supp. 2d app. at 556–62.

47. *See* 8 U.S.C. § 1324a(a)(1)(A), (h)(3) (2000).

48. *See id.* § 1324a(b)(1); 8 C.F.R. § 274a.2(a)(2) (2007) (discussing the verification form that employers are to use during the verification process).

49. *See* 8 C.F.R. § 274a.2(a)(2).

50. *See id.* § 274a.2(a)(3).

individual who became unauthorized subsequent to hiring—must discharge the employee immediately upon discovery of the employee’s status.⁵¹ An employee who provides fraudulent documents can be subject to harsh fines,⁵² and the same applies to the employer who violates these provisions.⁵³

Central to the City of Hazleton’s claim that the IIRA was a valid ordinance was the preemption clause contained in IRCA, which provides the following: “The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”⁵⁴ The city argued that in drafting its ordinances it had used “exacting precision” in following IRCA’s preemption clause and “eschewed the imposition of criminal or civil penalties,” instead taking “those actions expressly permitted by Congress.”⁵⁵ In particular, Hazleton avoided the use of criminal or civil sanctions but seized Congress’s implied invitation to create local enforcement provisions—such as the suspension of business permits for businesses that employ an unauthorized alien.⁵⁶ The city argued that such measures fall squarely within the “licensing and similar laws” exception to IRCA’s preemption clause.⁵⁷

The court rejected this interpretation completely. The court reasoned that suspending a business permit would be the “ultimate sanction,” and “[i]t would not make sense for Congress in limiting the state’s authority to allow states and municipalities the opportunity to provide the ultimate sanction, but no lesser penalty.”⁵⁸ In reaching its decision, the court relied in part on legislative history, referencing a report from the House Committee on the Judiciary.⁵⁹ The report, which examined the preemption clause of IRCA, led the court to conclude, “The ‘licensing’ that the statute discusses refers to revoking a local license for a violation of the federal IRCA sanction provisions, as opposed to revoking a business license for violation of local laws.”⁶⁰ In other words, IRCA’s “express pre-emption clause applies generally, except for state or local laws dealing with suspension, revocation or refusal to reissue a license to an entity found to have violated the sanction provisions of the IRCA.”⁶¹

51. 8 U.S.C. § 1324a(a)(2).

52. *See id.* § 1324c(d)(3).

53. *See id.* § 1324a(e)(4)(A), (f)(1).

54. *Id.* § 1324a(h)(2).

55. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 519 (M.D. Pa. 2007) (citations and internal quotation marks omitted).

56. *See id.*

57. *Id.*; *see also* Memorandum of Law in Support of Defendant’s Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6) at 42, *Lozano*, 496 F. Supp. 2d 477 (No. 3:06-cv-01586-JMM) [hereinafter Memorandum of Law], 2006 WL 4286242 (“Congress clearly left open a doorway for state and local legislation on the subject—in the form of sanctions . . . through licensing and similar laws.” (internal quotations marks omitted)).

58. *Lozano*, 496 F. Supp. 2d at 519.

59. *See id.* at 519–20 (citing H.R. REP. NO. 99-682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662).

60. *Id.* at 519.

61. *Id.* at 520 (internal quotation marks omitted).

b. Implied Preemption: Field and Conflict Preemption

The court also examined the IIRA in light of implied preemption, discussing in turn the two common forms of implied preemption—field preemption and conflict preemption.⁶² In finding that IRCA impliedly preempted the IIRA, the court stated that “[t]he federal government possesses an especially strong interest in immigration matters” and that “the individual states, or municipalities located in those states, do not.”⁶³ From the court’s perspective, the pervasiveness of federal law governing the employment of illegal aliens clearly illustrates that “IRCA is a comprehensive scheme” that “leaves no room for state regulation.”⁶⁴ In other words, “any additions added by local governments would be either in conflict with the law or a duplication of its terms—the very definition of field pre-emption.”⁶⁵ As if speaking directly to any state or municipality considering similar ordinances, the court emphatically declared, “Immigration is a national issue.”⁶⁶

The court also considered conflict preemption—whether the Hazelton ordinance conflicted with federal law in such a way that it either (1) stood “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” or (2) made it impossible for a party to comply with both the Hazelton ordinance and federal law.⁶⁷ Comparing the Hazelton ordinance with IRCA, the court found that “under federal law, the employer has the responsibility to review the documents,” while under the Hazelton ordinance, “the employer [would have been] required to present the documents to the [Hazelton] Code Enforcement Office, which contacts the federal government to determine the status of the worker.”⁶⁸ Accordingly, the court held that the ordinance conflicted with federal law.⁶⁹

Generally, the burden of examining the verification documents to determine an employee’s identity, residency status, and employment eligibility falls on the employer.⁷⁰ However, the Hazelton ordinance required an employee to provide to the employer “identification papers,” which the employer would have then delivered to the Hazelton Code Enforcement Office (CEO).⁷¹ The CEO would in turn have contacted the federal government to verify the employment eligibility of the potential worker.⁷² Furthermore, the IIRA required participation in the newly created Basic Pilot Program in certain circumstances,⁷³ while IRCA makes

62. *See id.* at 521–29.

63. *Id.* at 522.

64. *Id.* at 523.

65. *Id.*

66. *Id.* at 523. The court continued, “The United States Congress has provided complete and thorough regulations with regard to the employment of unauthorized aliens including anti-immigration discrimination provisions. Allowing States or local governments to legislate with regard to the employment of unauthorized aliens would interfere with Congressional objectives.” *Id.* at 523–24.

67. *Id.* at 525 (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 899 (2000)) (internal quotation marks omitted).

68. *Id.* at 526.

69. *See id.*

70. *See* 8 C.F.R. § 274a.2(b) (2007).

71. *Lozano*, 496 F. Supp. 2d. at 526.

72. *Id.*

73. *Id.* at 526–27.

participation in the Basic Pilot Program optional.⁷⁴ In so doing, the Hazleton ordinance “supplement[ed] the requirements of federal law.”⁷⁵ Because “the federal government . . . has enacted a complete scheme of regulation on the subject on the employment of unauthorized aliens,” the court declared, “Hazleton cannot conflict, interfere, curtail or complement this law.”⁷⁶ The court found that the IIRA did just that and was therefore preempted.⁷⁷

There are two important sidenotes to the court’s preemption discussion. First, the city relied heavily on the seminal Supreme Court decision on immigration, *De Canas v. Bica*,⁷⁸ which dealt with the constitutionality of a California statute regulating the employment of unauthorized alien residents.⁷⁹ The California statute at issue in *De Canas* penalized any employer who “knowingly employ[ed] an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.”⁸⁰

The City of Hazleton relied on *De Canas* for the proposition that “[n]ot every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted.”⁸¹ Further, the *De Canas* Court defined “regulation of immigration” as “essentially a determination of who should or should not be

74. According to the court, “The Basic Pilot Program is a voluntary, experimental program created by Congress to permit employers to electronically verify workers’ employment eligibility with the U.S. Dep. of Homeland Security and the Social Security Administration.” *Id.* (citing 8 U.S.C. § 1324a notes) (internal quotation marks omitted).

75. *Id.* at 526.

76. *Id.* at 529.

77. *Id.* In addition to the conflict in employment verification requirements, several other conflicts existed between the Hazleton ordinance and federal regulations. First, while federal law excludes from employer verification certain classes of workers, the IIRA had no such exclusions. *See Lozano*, 469 F. Supp. 2d at 526 (citing 8 C.F.R. § 2741a.1 (2007)). Second, the IIRA created a private cause of action against employers, while IRCA does not. Under the IIRA, if a business discharged an employee who was not “unlawful” while simultaneously employing a worker who *was* unlawful, the discharged employee could bring a private cause of action against the business for “unfair business practice.” *See Hazleton, Pa., Ordinance 2006-18*, at § 4(E)(2)(a) (Sept. 21, 2006), *available at* http://www.smalltowndefenders.com/090806/2006-18%20_Illegal%20Alien%20Immigration%20Relief%20Act.pdf. The discharged employee could seek treble damages, attorney’s fees, and the costs of the suit. *See id.* In addition to supplementing federal law, this private right of action was in direct opposition to settled state law in Pennsylvania. *See Lozano*, 496 F. Supp. 2d at 549–50 (noting that the private right of action disrupts well-settled principles of Pennsylvania’s at-will employment doctrine). Third, the IIRA required suspension of the business permit of any business entity that did not correct a violation—failure to provide proper identity data—within three days of the CEO’s notification, and there was no right to appeal the CEO’s findings. *See Hazleton, Pa., Ordinance 2006-18*, at § 4(B)(4). IRCA, on the other hand, allows an employer to appeal any finding by the Basic Pilot Program of nonconformance within eight days, after which the federal immigration officials and the Social Security Administration have ten days to respond. *See Pilot Programs for Employment Eligibility Confirmation*, 62 Fed. Reg. 48,309, 48,312 (Sept. 15, 1997). During that time, the employer is prohibited from taking any adverse action against the employee in question—including termination. *Id.* Finally, while IRCA prohibits employment discrimination against legally-admitted immigrants, the IIRA did not have any antidiscriminatory provisions. For IRCA’s prohibition on employment discrimination, see 8 U.S.C. § 1324b(a)(1) (2000).

78. *De Canas v. Bica*, 424 U.S. 351 (1976).

79. *See id.* at 352–53.

80. *Id.* (quoting CAL. LAB. CODE § 2805(a) (1971) (repealed 1988)) (internal quotation marks omitted).

81. *See Lozano*, 496 F. Supp. 2d at 524 (quoting *De Canas*, 424 U.S. at 355) (internal quotation marks omitted).

admitted into the country, and the conditions under which a legal entrant may remain.”⁸² The city argued that because the IIRA did not attempt to decide which aliens should or should not be admitted, the ordinance should not be preempted.⁸³

The court distinguished *De Canas* from Hazelton, however, suggesting that the difference lay in the fact that *De Canas* was decided pre-IRCA.⁸⁴ Under the old Immigration and Naturalization Act (INA), the principle aim was to regulate the immigration and naturalization of illegal aliens.⁸⁵ The employment of illegal aliens had not been of primary concern under the INA.⁸⁶ Between *De Canas* and *Lozano*, however, Congress enacted IRCA, which has the clear purpose of regulating the employment of unauthorized aliens.⁸⁷ According to the court, IRCA’s comprehensive scheme “occupies the field to the exclusion of State or local laws.”⁸⁸ Therefore, the court held that Hazelton’s ordinances were preempted.⁸⁹

The second important sidenote to the preemption discussion is the court’s concern for the policy that underlies its determination that immigration is a national issue. In addition to “border enforcement”—preventing entry of unauthorized persons—federal law is also concerned with “interior enforcement”—“distinguishing between legal and undocumented immigrants already in the country and removing the latter.”⁹⁰ Critical to interior enforcement is “a balance between finding and removing undocumented immigrants without accidentally removing immigrants and legal citizens, all without imposing too much of a burden on employers and workers.”⁹¹ The court noted that the results of this balancing act directly affect United States foreign relations.⁹² The court explained that the strong ramifications for national policy are precisely why “the United States political system places the responsibility for striking this balance with the United States Congress and the executive branch.”⁹³ One problem with Hazelton’s ordinances, according to the court, was the failure of the ordinances to consider effects beyond Hazelton’s local concerns.⁹⁴

2. *The IIRA and Due Process*

The *Lozano* plaintiffs’ second constitutional cause of action alleged that the IIRA employment provisions violated the Due Process Clause of the Fourteenth Amendment.⁹⁵ The issue before the court was twofold: first, whether the Due

82. *Id.* (quoting *De Canas*, 424 U.S. at 355) (internal quotation marks omitted).

83. See Memorandum of Law, *supra* note 57, at 53 (“The City of Hazelton does not attempt to ascertain any alien’s status, whether that status be easy to determine or difficult. Hazelton relies entirely upon the answer provided by federal officials.”).

84. See *Lozano*, 496 F. Supp. 2d at 524.

85. See *id.* at 524 (citing *De Canas*, 424 U.S. at 359).

86. See *id.* (citing *De Canas*, 424 U.S. at 359).

87. See *id.*

88. *Id.* at 523.

89. *Id.*

90. *Id.* at 527.

91. *Id.* at 527–28.

92. *Id.* at 528.

93. *Id.*

94. See *id.* (noting that Hazelton’s mayor and the city council were concerned only with Hazelton and “did not consider the implications of the ordinances on foreign policy”).

95. See Second Amended Complaint, *supra* note 35, at 39–43.

Process Clause protects the interests involved; and second, whether the procedures created in the IIRA provided adequate notice and the opportunity to be heard.⁹⁶

The Hazleton ordinances regulating employment affected the interests of at least two classes of people—Hazleton employers, and both current and potential employees. As to the employers, the court noted that “[a] business is an established property right entitled to protection under the Fourteenth Amendment.”⁹⁷ As to the employees, the court cited the Supreme Court’s acknowledgment that “the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.”⁹⁸ In addition, the court noted that the “Due Process Clause of the Fourteenth Amendment applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”⁹⁹ Therefore, the court found no difficulty in concluding that the Due Process Clause was applicable to the interests of both the employers and employees before the court.¹⁰⁰

The court next had to determine whether the Hazleton ordinances created a process that adequately protected the interests discussed above, and whether that process included adequate notice for both employers and employees.¹⁰¹ Upon close examination of the process, the court found that the employment provisions of the ordinances failed to properly notify an employee when a complaint was filed regarding that employee’s eligibility.¹⁰² Because the IIRA did not require an employee to be notified in such a situation, nothing within the IIRA’s process prevented an employer from simply choosing to terminate the worker’s employment rather than taking the requisite steps to verify the employee’s eligibility status.¹⁰³ Thus, the IIRA contained no procedural protection for an employee in this situation.¹⁰⁴ In addition, the court found the IIRA lacking in its failure to define “identity information” and in its failure to provide the employee with an opportunity to request a second or additional verification.¹⁰⁵

3. *The IIRA and Equal Protection*

The third constitutional claim the plaintiffs brought in *Lozano* alleged that the IIRA violated the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁶ The

96. See *Lozano*, 496 F. Supp. 2d at 533–34.

97. *Id.* at 533 (quoting *Coll. Sav. Bank v. Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 361 (3d Cir. 1997)) (internal quotation marks omitted).

98. *Id.* at 534 (quoting *Truax v. Raich*, 239 U.S. 33, 41 (1915)) (alteration in original) (internal quotation marks omitted).

99. *Id.* (quoting *Kamara v. Attorney Gen. of U.S.*, 420 F.3d 202, 216 (3d Cir. 2005)) (internal quotation marks omitted).

100. See *id.*

101. See *id.* The court also analyzed the Registration Ordinance and the landlord–tenant regulations in the IIRA under the Due Process Clause. *Id.* Because the focus of this Note is on the employment related provisions of the IIRA, it will not discuss the due process concerns of the Registration Ordinance.

102. See *id.* at 536.

103. *Id.*

104. *Id.*

105. See *id.*

106. See Second Amended Complaint, *supra* note 35, at 43–46.

crux of the plaintiffs' argument centered on the language of the IIRA regarding complaints.¹⁰⁷ The plaintiffs contended that such a policy, which allowed the city to consider race, ethnicity, or national origin when determining whether a complaint was valid, implicated a discriminatory intent by default;¹⁰⁸ although a complaint could not be based exclusively or primarily on suspect classifications, such classifications could play a lesser role in filing a complaint.¹⁰⁹ The city council eventually amended the IIRA,¹¹⁰ which the plaintiffs argued was done "in an effort to simplify this issue and remove the equal protection challenge from the case."¹¹¹ The amended version removed the phrase "solely or primarily," thereby also removing from the city the responsibility of determining the validity of a complaint based on suspect classifications.¹¹²

Unlike the first two constitutional challenges, the court was not persuaded by the plaintiffs' equal protection claim.¹¹³ The most recent version of the IIRA had effectively accomplished its objective by amending away any provisions susceptible to an equal protection claim.¹¹⁴ As a result, the plaintiffs changed gears in their equal protection challenge; rather than focusing on the actual language of the IIRA, they instead challenged the intent behind the legislation.¹¹⁵ The court responded to this tactical move by noting that, in order to show that a facially neutral ordinance was intentionally discriminatory, the plaintiffs "must show that the relevant decisionmaker . . . adopted the policy at issue because of, not merely in spite of, its adverse effects upon an identifiable group."¹¹⁶ The court held that because the plaintiffs failed to demonstrate that the IIRA was passed with a discriminatory intent, they did not prove a necessary element for their equal protection challenge of a facially neutral policy.¹¹⁷

107. *See id.* The relevant portion of the IIRA stated, "A complaint which alleges a violation solely or primarily on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced." Hazelton, Pa., Ordinance 2006-18, at § 4(B)(2) (Sept. 21, 2006), *available at* http://www.smalltowndefenders.com/090806/2006-18%20_Illegal%20Alien%20Immigration%20Relief%20Act.pdf.

108. *See* Second Amended Complaint, *supra* note 35, at 44–45.

109. *See Lozano*, 496 F. Supp. 2d at 539.

110. *See id.* As with the other portions of the ordinance that were amended after this litigation was commenced, the court determined that it would evaluate only the latest version of the ordinances rather than ruling on the validity of a law that was no longer in existence. *See supra* note 36.

111. *Lozano*, 496 F. Supp. 2d at 539 (internal quotation marks omitted).

112. *See id.*

113. *See id.* at 541.

114. *See id.* at 539 ("Hazelton's trial counsel argued that the City had made this change 'in an effort to simplify this issue and remove the equal protection challenge' from the case.").

115. *See id.* at 540 ("[Plaintiffs] have apparently shifted their emphasis from a focus on the language of the policy itself to an inquiry into the defendant's intent in amending [the] IIRA.").

116. *Id.* (quoting *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 562 (3d Cir. 2002)) (internal quotation marks omitted).

117. *Id.*; *see also* *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) ("[E]ven if a neutral law has a disproportionately adverse effect upon a . . . minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."); *Antonelli v. New Jersey*, 419 F.3d 267, 274 (3d Cir. 2005) ("[The Equal Protection Clause] prohibits states from intentionally discriminating between individuals on the basis of race." (citing *Shaw v. Reno*, 509 U.S. 630, 642 (1993))). The plaintiffs offered the testimony of an immigration expert as proof of the discriminatory effect of the IIRA and testimony of Hazelton's mayor, as well as evidence of the city council's actions as proof of the discriminatory intent. *See Lozano*, 496 F. Supp. 2d at 540–41. The court was not persuaded by the evidence. *See id.* at 541.

In summary, the court held that federal law preempted the IIRA¹¹⁸ and that the IIRA violated the Due Process Clause by failing to provide adequate notice and an opportunity to be heard.¹¹⁹ However, the court concluded that the IIRA did not violate the Equal Protection Clause on its face.¹²⁰

III. BEAUFORT COUNTY'S LAWFUL EMPLOYMENT ORDINANCE

A. *Growth of Immigration in Beaufort County*

In recent years, the number of immigrants migrating to Beaufort County has increased the Latino population in Hilton Head from one percent of the population in 1995 to approximately fifteen percent in 2006—a significant increase for a small town of 34,000.¹²¹ Most of the immigrants are Mexican, and many are attracted to the resort city because of the numerous jobs in construction and hospitality.¹²² Blaming the inaction of Congress for the large influx of illegal immigrants and citing strains on the local schools, healthcare systems, and job market,¹²³ the County Council of Beaufort County decided to take matters into its own hands. In December 2006, the council approved the Lawful Employment Ordinance (LEO).¹²⁴ LEO, which passed by a vote of 9-0,¹²⁵ was the product of several revisions and changed significantly from the version originally proposed by council member Starletta Hairston.¹²⁶ In its original form, Beaufort County's ordinance was modeled after the City of Hazleton's Illegal Immigration Relief Act¹²⁷ and included identical sections such as the "harboring" provision contained in Hazleton's IIRA.¹²⁸ However, the version that the county council eventually passed removed several of these provisions, and the final version of LEO deals primarily with the employment of unauthorized aliens.¹²⁹

118. See *Lozano*, 496 F. Supp. 2d at 521, 529, 533.

119. See *Lozano*, 496 F. Supp. 2d at 537–38.

120. See *Lozano*, 496 F. Supp. 2d at 542.

121. See *Jordan*, *supra* note 4.

122. *Id.*

123. See Noelle Phillips, *S.C. Watches as Beaufort County Struggles with Immigration Issues*, STATE, Dec. 10, 2006, at A1 (noting that supporters of the ordinance believe the county must act "because the federal government has failed to act" and because "illegal immigrants put a strain on community school and health care systems and take jobs from locals").

124. See BEAUFORT COUNTY, S.C., CODE § 18-69 (2007); Jeremy Hsieh, *County Council Passes Lawful Employment Ordinance; Incoming Council Members Criticize Last-Minute Approval*, BEAUFORT GAZETTE (S.C.), Dec. 28, 2006, at 1A.

125. See Hsieh, *supra* note 124.

126. See Jeremy Hsieh, *Federal Judge Strikes Down Law on Illegal Immigration*, BEAUFORT GAZETTE (S.C.), July 27, 2007, at 1A (noting that the Beaufort County Council passed a "watered-down version" of the original ordinance, which had been "modeled closely after Hazleton's").

127. See *id.*

128. See Beaufort County, S.C., Ordinance 2006/31 (Proposed Third Draft 2006), <http://www.bcgov.net/council/ordinances/REVISED%20BUSINESS%20LICENSE%20ORDINANCE%20AND%20UNLAWFUL%20WORKER%20PROGRAM%20DRAFT3%20102306%20sdb.pdf>.

129. See BEAUFORT COUNTY, S.C., CODE § 18-69.

B. *The Lawful Employment Ordinance*

Beaufort County enacted LEO to prohibit the hiring of “any person who is an unauthorized alien for employment in the United States.”¹³⁰ Any person or business applying for a license in Beaufort County must file a form with the county declaring, under penalty of perjury, that such person or business “does not knowingly utilize the services of, engage or hire any person who is an unauthorized alien.”¹³¹ The County of Beaufort Business License Division (License Division) is authorized to enforce the requirements of LEO by commencing an investigation of a business “if an inspection or audit performed pursuant to Beaufort County Ordinance [Code] section 18-57 shows that the licensee does not meet the documentation requirements contained in 8 U.S.C. § 1324a for persons employed in Beaufort County.”¹³² Once an investigation is commenced, the licensee is given three days to produce certain employment verification documents.¹³³ If the licensee fails to produce the required documentation, an enforcement action is commenced.¹³⁴ The License Division is required to give proper notice to the licensee upon commencement of an enforcement action.¹³⁵ The licensee may have as many as sixty days to provide additional information that would support the allegedly unauthorized alien’s actual authorization to work in the United States.¹³⁶ During this time, “the licensee’s business license shall remain unaltered.”¹³⁷ Only where “the licensee fails to provide additional documentation or [where] the license inspector finds the additional documentation does not meet the requirements of 8 U.S.C. § 1324a” will the county suspend the licensee’s business license.¹³⁸ Finally, appeals of the License Division’s decision can be made to the county council.¹³⁹

IV. BEAUFORT COUNTY VERSUS HAZLETON: APPLYING THE ANALYSIS OF *LOZANO V. CITY OF HAZLETON* TO BEAUFORT COUNTY’S LAWFUL EMPLOYMENT ORDINANCE

The decision in *Lozano* provided “a glaring red stop light” to counties and municipalities across the country on the road to addressing the problem of illegal immigration.¹⁴⁰ According to senior counsel for the Puerto Rican Defense Fund, the *Lozano* opinion is a “bulletproof decision” that is “meticulous, careful and well

130. *See id.* As used throughout the ordinance, “unauthorized alien” is defined by the same as in 8 U.S.C. § 1324a(h)(3) (2000). *See id.* § 18-69(1)(a)(7) (“The county shall not conclude that a person is an unauthorized alien unless and until an authorized representative of the county has verified with the federal government, pursuant to United States Code Title 8, subsection 1373(c), the person’s authorization to work.”).

131. *Id.* § 18-69(2)(a)(2).

132. *Id.* § 18-69(3)(b)(1).

133. *Id.* The verification documents are defined in 8 C.F.R. § 274a.2(b) (2007).

134. BEAUFORT COUNTY, S.C., CODE § 18-69(3)(b)(2).

135. *Id.* § 18-69(3)(c)(1).

136. *See id.* § 18-69(3)(d)(2).

137. *Id.*

138. *Id.* § 18-69(3)(e)(1).

139. *See id.* § 18-69(3)(f).

140. Julia Preston, *Judge Voids Ordinances on Illegal Immigrants*, N.Y. TIMES, July 27, 2007, at A14 (quoting the lead ACLU lawyer in *Lozano* as saying that “[t]his opinion should be a glaring red stop light for any local officials thinking about passing similar laws”).

thought out,” and is “devastating to towns, be it Beaufort or Hazleton.”¹⁴¹ Is the Beaufort County LEO similar enough to Hazleton’s IIRA to be susceptible to the legal analysis of *Lozano* or can Beaufort County’s watered-down version survive judicial scrutiny? To answer that question, one must examine LEO in light of the three constitutional challenges the *Lozano* court examined regarding the IIRA.¹⁴²

A. *The Lawful Employment Ordinance and Preemption*

The Beaufort County ordinance is most susceptible to a constitutional challenge under *Lozano*’s preemption analysis because LEO is probably impliedly preempted under both field and conflict preemption. First, any justification for Beaufort County’s decision to wade into the waters controlled by federal immigration regulation likely would be grounded in the express preemption clause contained in IRCA.¹⁴³ Though Beaufort County takes a much different route than Hazleton in regulating and enforcing its ordinance, the destination is ultimately the same: failure to correct the violation will result in the suspension of the business license or permit.¹⁴⁴ Because this is the type of ultimate sanction decreed by the *Lozano* court,¹⁴⁵ LEO could be challenged as being expressly preempted by IRCA.

Notably, in just a few sentences, *Lozano* essentially disposes of what is perhaps the most important part of the defense offered by the City of Hazleton on behalf of its would-be immigration reforms—that local laws regulating the employment of unauthorized aliens are expressly permitted as “licensing and similar laws” under 8 U.S.C. § 1324a(h)(2).¹⁴⁶ The *Lozano* court distinguished the type of license

141. Hsieh, *supra* note 126 (internal quotation marks omitted).

142. See discussion *supra* Part II.B.

143. See 8 U.S.C. § 1324a(h)(2) (2000); *supra* text accompanying notes 46–61 (discussing the *Lozano* court’s application of IRCA’s preemption clause to the Hazleton ordinance).

144. See *supra* text accompanying notes 56–57, 132–38.

145. See *supra* text accompanying notes 58–61.

146. See *supra* text accompanying notes 60–61. Possibly, the *Lozano* court interpreted the preemption clause too narrowly. Under the IIRA, there were no civil or criminal sanctions, and the suspension of a business permit was not permanent but lasted only until the violation was corrected. See Hazleton, Pa., Ordinance 2006-18, at § 4(B)(6) (Sept. 21, 2006), available at <http://www.smalltowndefenders.com/090806/2006-18%20Illegal%20Alien%20Immigration%20Relief%20Act.pdf>. LEO is even more forgiving in the initial enforcement action than was the IIRA, and the License Division may not suspend a license under LEO unless a licensee fails or refuses to provide the necessary documentation within a period of up to sixty days. See BEAUFORT COUNTY, S.C., CODE § 18-69(3) (2007). The licensee is allowed three days “to produce employment verification documents” after an investigation commences. *Id.* § 18-69(3)(b)(1). Once a licensee receives notice of an enforcement action, the licensee can submit additional documentation to the License Division within fifteen days, with a possible forty-five day extension. *Id.* § 18-69(3)(d)(2). Throughout this entire period, “the licensee’s business license shall remain unaltered.” *Id.* Despite the *Lozano* court’s assumption that the city would wield the power of permit suspension in such a way that it would “force the employer out of business,” *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 519 (M.D. Pa. 2007), the permit suspension in both ordinances was and is only a temporary measure and one that arguably fits the violation. If a business breaks the law, it loses its right to operate with a permit. However, if the business corrects the problem, it can be legally recognized once again. The *Lozano* court reasoned, “It would not make sense for Congress in limiting the state’s authority to allow states and municipalities the opportunity to provide the ultimate sanction, but no lesser penalty. Such an interpretation renders the express preemption clause [of IRCA] nearly meaningless.” *Id.* Yet, to classify even a temporary suspension of a business license as the “ultimate sanction” significantly reduces the amount of regulation a local municipality can actually accomplish through the “licensing and similar laws”

suspension allowed under IRCA from the suspension created by the IIRA, stating the following: “Hazelton suspends the business permit of those who violate its Ordinance, not those who violate the IRCA. Thus, the licensing exception to State and local pre-emption is not applicable.”¹⁴⁷ Whether the court’s semantic sidestep withstands appellate scrutiny remains to be seen. Nevertheless, *Lozano* now stands for the proposition that any regulation that results in the “ultimate sanction” will necessarily be preempted by IRCA.¹⁴⁸

Second, under the conflict preemption analysis discussed above,¹⁴⁹ the federal government’s scheme of regulation regarding the employment of unauthorized aliens means that Beaufort County could not enact any legislation that “conflict[s], interfere[s], curtail[s] or complement[s] this law.”¹⁵⁰ LEO avoids the conflict problems of the IIRA in several ways. First, although the language in both ordinances is similar regarding employment,¹⁵¹ Beaufort County specifically ties its prohibition against employing unauthorized aliens to IRCA.¹⁵² Thus, rather than adding to federal law, Beaufort County has merely reiterated it. Second, LEO specifically prohibits a licensee from “knowingly” employing an unauthorized alien.¹⁵³ The IIRA originally lacked a provision regarding the element of knowledge, which IRCA specifically required, and the court indicated that the failure to include this element would constitute a conflict with federal law.¹⁵⁴ Third, the court criticized the IIRA for its mandatory requirement that all employers participate in the Basic Pilot Program, because IRCA does not mandate participation in the Basic Pilot Program.¹⁵⁵ Beaufort County avoided this pitfall by removing the Basic Pilot Program provision entirely from its final version of LEO. Finally, the IIRA ran afoul of federal regulations by failing to include any antidiscrimination provisions in the ordinance.¹⁵⁶ In contrast, LEO requires that employers “treat all employees uniformly when completing employment eligibility verification documents” and prohibits employers from setting “different

exception to IRCA’s preemption clause, effectively rendering the exception meaningless.

147. *Lozano*, 496 F. Supp. 2d at 520. While this same argument could be applied to LEO, the structure of LEO that ties its documentation requirements directly to IRCA means that a business could only violate the ordinance by violating IRCA itself. See *infra* text accompanying note 166.

148. See *Lozano*, 496 F. Supp. 2d at 519.

149. See *supra* notes 67–77 and accompanying text.

150. See *Lozano*, 496 F. Supp. 2d at 529.

151. Compare *Hazleton, Pa.*, Ordinance 2006-18, at § 4(A) (“It is unlawful for any business entity to recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City.”), with *BEAUFORT COUNTY, S.C.*, CODE § 18-69(2)(a)(1) (“Pursuant to 8 U.S.C. § 1324a, it is unlawful for a person or other entity to recruit, hire, or continue to hire any person who is an unauthorized alien for employment in the United States.”).

152. *BEAUFORT COUNTY, S.C.*, CODE § 18-69(2)(a)(1).

153. See *id.* § 18-69(2)(a)(2). Specifically, LEO provides,

Every business or person that applies for a business license to engage in any type of work in the county shall attest under penalty of perjury, on a form designated by the county, that the licensee does not knowingly utilize the services of, engage or hire any person who is an unauthorized alien.

Id.

154. See *Lozano*, 496 F. Supp. 2d at 526.

155. *Id.* at 526–27.

156. See *id.* at 529 (“[T]he Ordinance, unlike its superior federal counterpart, contains no antidiscrimination provisions.”).

employment eligibility verification standards for different groups of employees.”¹⁵⁷ LEO also provides that “[a]n allegation of discrimination may be filed by an individual who believes he or she is the victim of employment discrimination by contacting the appropriate state and federal agencies.”¹⁵⁸

However, although LEO avoids many of the conflicts that the IIRA contained, LEO shares at least one problem with the IIRA that could ultimately result in preemption. Both ordinances require a city or county department—in Hazleton, the CEO, and in Beaufort County, the License Division—to collect and review the applicable identification documents to verify the eligibility of the suspected worker.¹⁵⁹ Under *Lozano*’s analysis, the intermediary review position of the License Division, like the CEO in Hazleton, arguably supplements federal law and could therefore be impliedly preempted.¹⁶⁰

B. *The Lawful Employment Ordinance and Due Process*

Although the Beaufort County LEO probably provides adequate notice to employers against whom an enforcement action has been commenced,¹⁶¹ it may be susceptible to a due process challenge because it fails to provide adequate notice to any employee against whom action is being taken. In addition, the hearing and appeal process available to employers and employees under LEO likely will not withstand judicial scrutiny.¹⁶²

157. BEAUFORT COUNTY, S.C., CODE § 18-69(2)(b)(2). LEO ties this employment discrimination prohibition to federal and state laws prohibiting discrimination such as the Federal Immigration and Nationality Act, Title VII of the Civil Rights Act of 1964, the South Carolina Human Affairs Law, S.C. CODE ANN. §§ 1-13-10 to -110 (2005), and the South Carolina Unfair Trade Practices Act, S.C. CODE ANN. §§ 39-5-10 to -170 (1976 & Supp. 2007). *See id.* § 18-69(2)(b)(1).

158. *Id.* § 18-69(2)(b)(3). In the context of the previous antidiscrimination provisions, this provision clearly would apply to a situation where an employer had set different employment eligibility verification standards for different employees in violation of section 18-69(2)(b)(2). However, section 18-69(2)(b)(3) seems equally applicable to the situation anticipated by the *Lozano* court, where an employer decides to discharge an allegedly unauthorized employee to avoid the difficulty of determining the immigration status of the employee. *See Lozano*, 496 F. Supp. 2d at 536.

159. *Compare* BEAUFORT COUNTY, S.C., CODE § 18-69(3)(b)(2) (noting that an enforcement action begins if “the licensee fails to produce the required documentation to the business license division”), with Hazleton, Pa., Ordinance 2006-18, at § 4(B)(3) (Sept. 21, 2006), available at http://www.smalltowndefenders.com/090806/2006-18%20_Illegal%20Alien%20Immigration%20Relief%20Act.pdf (“[T]he Hazleton Code Enforcement Office shall . . . request identity information from the business entity regarding any persons alleged to be unlawful workers.”). This review process is discussed further under the due process analysis below.

160. *See Lozano*, 496 F. Supp. 2d at 526. The court stated,

The primary conflict in this area is that under federal law, the employer has the responsibility to review the documents, and in the Hazleton Ordinance, the employer is required to present the documents to the Code Enforcement Office, which contacts the federal government to determine the status of the worker. The Hazleton Ordinance, therefore, supplements the requirements of federal law.

Id. The *Lozano* court also found that the IIRA conflicted with federal law by failing to exempt certain employees from verification requirements—something IRCA requires. *See id.* (noting that independent contractors and casual domestic workers are excluded from federal verification requirements and that the “IIRA contains no such exclusions” (citing 8 C.F.R. § 2741a.1 (2007))). LEO likewise fails to exempt such workers from immigration status verification. *See* BEAUFORT COUNTY, S.C., CODE § 18-69.

161. *See* BEAUFORT COUNTY, S.C., CODE § 18-69(3).

162. *See id.* § 18-69(3)(f).

The most notable difference between LEO and the IIRA is the method of enforcement prescribed by each ordinance. Under the Hazleton IIRA, enforcement was “initiated by means of a written signed complaint to the Hazleton Code Enforcement Office.”¹⁶³ The complaint could be initiated by any person or entity, and a valid complaint only needed to “include an allegation which describes the alleged violator(s) as well as the actions constituting the violation, and the date and location where such actions occurred.”¹⁶⁴

Beaufort County employs a much different enforcement system. Section 18-57 of the Beaufort County Code of Ordinances authorizes “the license inspector or other authorized agent of the county” to inspect, examine, and audit the records of businesses within the county to ensure compliance with the county’s business and professional licenses requirements.¹⁶⁵ Under LEO, an investigation is commenced “if an inspection or audit [performed by the county] shows that the licensee does not meet the documentation requirements contained in 8 U.S.C. § 1324a for persons employed in Beaufort County.”¹⁶⁶ Only where the licensee does not produce the necessary documentation will the License Division commence an enforcement action.¹⁶⁷

The death knell for the IIRA under *Lozano*’s due process analysis was the ordinance’s failure to provide adequate notice.¹⁶⁸ As the court noted, “notice is the cornerstone of due process,” and the IIRA did not provide adequate notice either to employers or employees.¹⁶⁹ The IIRA required the Hazleton CEO to request “identity information” from an employer regarding “any persons alleged to be unlawful workers.”¹⁷⁰ The court found a problem with this provision, in that the ordinance did not “specify the nature of this information” or allow employees to request “verification” in this regard.¹⁷¹ From the court’s perspective, this left employers unsure of what documents were needed for the “hearing”; thus, the IIRA ran afoul of due process.¹⁷²

LEO, by contrast, specifically connects its documentation requirements with the federal requirements under 8 U.S.C. § 1324a.¹⁷³ Under LEO, an investigation is commenced only if an inspection shows that those federally-prescribed documentation requirements are not met.¹⁷⁴ Moreover, section 18-69(3)(d)(1) permits the licensee to submit “additional documentation” to the License Division “to support that the alleged unauthorized alien is authorized to work in the United States.”¹⁷⁵ While “additional documentation” is no more specific than “identity information,” a reasonable reading of the ordinance suggests that the additional

163. Hazleton, Pa., Ordinance 2006-18, at § (4)(B)(1).

164. *Id.*

165. See BEAUFORT COUNTY, S.C., CODE § 18-57.

166. *Id.* § 18-69(3)(b)(1).

167. *Id.* § 18-69(3)(b)(2).

168. See *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477, 536 (M.D. Pa. 2007).

169. *Id.*

170. See Hazleton, Pa., Ordinance 2006-18, at § 4(B)(3) (Sept. 21, 2006), available at http://www.smalltowndefenders.com/090806/2006-18%20_Illegal%20Alien%20Immigration%20Relief%20Act.pdf

171. See *Lozano*, 496 F. Supp. 2d at 536.

172. See *id.*

173. See BEAUFORT COUNTY, S.C., CODE § 18-69(3)(b)(1) (2007).

174. See *id.* § 18-69(b)(2).

175. *Id.* § 18-69(3)(d)(1).

documentation described in section 18-69(4)(d)(1) consists of any documentation required under 8 U.S.C. § 1324a that was not provided during the initial inspection or audit.

Even though LEO may avoid the problem of insufficient notice by connecting its documentation requirements with federal law, LEO may still be too vague in specifying the nature of the required information.¹⁷⁶ IRCA requires employers to review original documents chosen by the employee from the I-9 Form's list of acceptable documents and to keep a copy of the I-9 Form to verify identity and employment eligibility.¹⁷⁷ IRCA does not require employers to retain copies of those documents after the I-9 verification is complete.¹⁷⁸ Therefore, the question becomes whether the I-9 Form would qualify as sufficient employment verification documentation for purposes of a county investigation of a business under LEO. LEO is unclear in this respect.

If the employer's policy does not include retaining copies of the original documents presented, then the employer may risk charges of discrimination by requesting those documents from the employee again.¹⁷⁹ This second request would, in effect, amount to reverifying the employee despite the fact that the employer was already satisfied with the first verification. Such reverification may be directly contrary to IRCA.¹⁸⁰ Because LEO does not specify whether production of a copy of the I-9 Form is sufficient to meet the verification requirements under section 18-69(3)(B)(1), this could present an additional problem in providing proper notice to employers.

This ambiguity in LEO probably would not prove fatal under a due process challenge. If LEO is interpreted merely to require an I-9 verification form, then its requirements are identical to that of IRCA, which likely would equate to sufficient notice. However, if LEO were interpreted as requiring more than the I-9 Form (e.g., the original documents), then this provision probably would not be challenged under the Due Process Clause but likely would be challenged as being preempted by federal law.¹⁸¹ Therefore, by only requiring documents already required by federal law, LEO seemingly provides sufficient notice to employers despite LEO's potential vagueness regarding the nature of the required documents.

176. *See id.* § 18-69(3).

177. 8 U.S.C. § 1324a(b)(3) (2000) (requiring employers to "retain the [verification] form and make it available for inspection").

178. *See id.*

179. *See* 8 U.S.C. § 1324b(a)(6). Section 1324b(a)(6) provides, "A person's or other entity's request . . . for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice . . ." *Id.*

180. *See id.* § 1324a(b)(1)(A). Specifically, section 1324a(b)(1)(A) provides the following:

If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements of the first sentence of this paragraph, nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such another document.

Id.

181. *See* *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 526 (M.D. Pa. 2007) (determining that the Hazleton ordinance was preempted because it "supplement[ed] the requirements of federal law").

The IIRA also failed to provide adequate notice to employees affected by the ordinance.¹⁸² In this regard, Beaufort County's ordinance is likewise inadequate. As discussed above, LEO appears to provide ample notice to the employer. However, as expressed by *Lozano*, notice to the employee is also a great concern.¹⁸³ The court expressed its fear that, when faced with a complaint filed with the city, an employer in Hazelton may simply choose to fire the allegedly unauthorized employee rather than determining the employee's actual status as an immigrant.¹⁸⁴ Under the IIRA, the employee in this scenario had no protection.¹⁸⁵ Though structured differently, the fact that Beaufort County's ordinance also fails to provide notice to the employee may spell trouble for LEO.

In addition to the lack of adequate notice, the *Lozano* court found that the IIRA failed to give due process in its provision for judicial review of the city's determination of an alien's immigration status.¹⁸⁶ Under Hazelton's Illegal Immigration Relief Act Implementation Amendment (Implementation Amendment), which the city council added to the IIRA on December 28, 2006,¹⁸⁷ an employer or employee subject to a complaint could "challenge the enforcement of [the IIRA] with respect to such entity or individual in the [magisterial district court], subject to the right of appeal to the [county court]."¹⁸⁸ However, the court found this problematic, because "[t]he Pennsylvania courts . . . do not have the authority to determine an alien's immigration status."¹⁸⁹ The court emphasized that this determination "can only be [made] by an immigration judge."¹⁹⁰ Thus, the court concluded, "[The] IIRA attempts to provide procedural protection to those affected by it by resorting to courts that do not have jurisdiction over determinations of immigration status. [This] is a violation of due process."¹⁹¹

On the one hand, if the court's analysis of the Implementation Amendment is correct, then the Beaufort County ordinance appears to raise similar concerns. Section 3(f) of LEO provides, "Appeal of the business license division's findings and the suspension of a license is available as provided under Beaufort County Ordinance [Code] section 18-63."¹⁹² Section 18-63 establishes the general appeals process, which provides, "Any person aggrieved by a final assessment or a denial of a business license under this article by the license inspector may appeal the decision to county council."¹⁹³ If an appeal to the Hazelton magisterial district court

182. See *supra* text accompanying notes 102–04.

183. See *Lozano*, 496 F. Supp. at 536 ("[The] IIRA fails to require that anyone provide notice to an employee when a complaint is filed or at any time during the proceedings.").

184. See *id.*

185. *Id.*

186. See *id.* at 536–37.

187. See *id.* at 484.

188. Hazelton, Pa., Ordinance 2006-40 § 7(F) (Dec. 28, 2006), available at http://www.prldef.org/Civil/Hazelton/hazelton%20legal%20documents/2006-40%20_IIRA%20Implementation%20Amendment_.pdf. The Implementation Amendment further provided, "Such an entity or individual may alternatively challenge the enforcement of [the IIRA] with respect to such entity or individual in any other court of competent jurisdiction in accordance with applicable law, subject to all rights of appeal." *Id.*

189. *Lozano*, 496 F. Supp. 2d at 536.

190. *Id.* (citing 8 U.S.C. § 1229a(a)(1) (2000)).

191. *Id.* at 536–37.

192. BEAUFORT COUNTY, S.C., CODE § 18-69(3)(f) (2007).

193. *Id.* § 18-63(a).

or county court raises due process concerns for lack of jurisdiction,¹⁹⁴ the same likely would be true of an appeal to the Beaufort County Council.

On the other hand, the *Lozano* court arguably misinterpreted the Implementation Amendment, and thus LEO may not be vulnerable on jurisdictional grounds. The court seemingly ignores section (G) of the Implementation Amendment, which specifically provides that “the determination of whether a worker is an unauthorized alien shall be made by the federal government, pursuant to United States Code Title 8, Subsection 1373(c).”¹⁹⁵ Subsection 1373(c) requires the Immigration and Naturalization Service to “respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.”¹⁹⁶ While the court construed the Implementation Amendment as a usurpation of the immigration judge’s role in determining whether an alien may be admitted or removed from the country,¹⁹⁷ a fair reading of the IIRA as a whole seems to suggest no such intention or effect. The IIRA’s enforcement action and any subsequent appeal of such action are not meant to determine the immigration status of an alien—whether the alien should be admitted or removed—but merely to ascertain a *previously determined* status. By directly referencing § 1373(c), it is difficult to see how Hazleton, as a “local government agency,” is doing anything more than inquiring into an individual’s immigration status—an inquiry expressly allowed under § 1373(c).¹⁹⁸

The same is true of Beaufort County’s ordinance. LEO creates a system to ensure that employers meet the documentation requirements set forth under federal law.¹⁹⁹ The language of LEO evidences this concern: the investigation commences if a “licensee does not meet the documentation requirements contained in 8 U.S.C. § 1324a”;²⁰⁰ the enforcement action is commenced only if the “licensee fails to produce the required documentation” upon request;²⁰¹ and the licensee is permitted to submit “additional documentation to support that the alleged unauthorized alien is authorized to work in the United States.”²⁰² While subsection 3(b)(3) does indicate that the required documentation is submitted to the federal government for verification pursuant to 8 U.S.C. § 1373, that provision also requires the License Division only to notify the licensee—rather than suspend the license or penalize the licensee.²⁰³ Furthermore, LEO ultimately suspends a license only where “the licensee fails to provide additional documentation or if the license inspector finds the additional documentation does not meet the requirements of 8 U.S.C.

194. See *supra* text accompanying notes 186–91.

195. Hazleton, Pa., Ordinance 2006-40, at § 7(G) (Dec. 28, 2006), available at http://www.pridef.org/Civil/Hazleton/hazleton%20legal%20documents/2006-40%20_IIRA%20Implementation%20Amendment_.pdf.

196. 8 U.S.C. § 1373(c) (2000).

197. See *Lozano*, 496 F. Supp. 2d at 536–37.

198. See 8 U.S.C. § 1373(c).

199. See BEAUFORT COUNTY, S.C., CODE § 18-69(3) (2007).

200. *Id.* § 18-69(3)(b)(1).

201. *Id.* § 18-69(3)(b)(2).

202. *Id.* § 18-69(3)(d)(1).

203. See *id.* § 18-69(3)(b)(3).

§ 1324a.”²⁰⁴ Thus, should an appeal be made to the county council under subsection 3(f), the matter for review by the council would be whether the documentation requirements are met, not whether the alien’s status is one requiring admission or deportation.²⁰⁵ However, the *Lozano* decision appears to stand for the proposition that even this type of appellate review would not satisfy due process.²⁰⁶

C. *The Lawful Employment Ordinance and Equal Protection*

Critics of these local immigration reforms have raised concerns about potential equal protection violations.²⁰⁷ The national context in which many of these reforms have taken place leads to a valid fear that immigration legislation will result in racial profiling and that these ordinances will inevitably have a discriminatory effect on certain groups within the community, particularly Hispanic and Mexican-American immigrants.²⁰⁸

The IIRA created a complaint-based enforcement action, where any person or business entity could file a complaint alleging a violation by either an employer or an employee.²⁰⁹ Once a valid complaint was filed, the enforcement action was commenced immediately.²¹⁰ Further, the IIRA allowed the city to suspend the business permit of the alleged violating employer if the employer did not provide proper identification information within three days of the city’s request.²¹¹ LEO, on the other hand, provides for an enforcement action only as a result of an inspection or audit performed by the county, and the enforcement action begins only after the licensee has failed to produce the required documents requested by the License Division.²¹² The complaint-based scheme of the IIRA seemed to center more on an alleged violator, while LEO centers on failures to meet documentation requirements.²¹³ Because LEO’s enforcement action is initiated based on inadequate documentation rather than on allegations regarding specific individuals, the possibility of discriminatory enforcement actions is significantly diminished.

Even if a court were not to draw such a distinction between the ordinances, LEO likely would withstand an equal protection challenge under the *Lozano* court’s analysis. LEO is a facially neutral policy, and as discussed above, a plaintiff would

204. *Id.* § 18-69(3)(e)(1).

205. *See id.* § 18-69(3)(f).

206. *See supra* text accompanying notes 187–91.

207. *See* Parlow, *supra* note 13, at 1072.

208. *See* *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 509 n.31 (M.D. Pa. 2007) (noting that the ordinances in Hazleton “had the effect of increasing racial tension in the City”); Conley & Rosenberg, *supra* note 11, at 40 (“Hispanic residents [in Hazleton] have moved; businesses catering to Latinos have closed due to lack of patrons; and individuals who look and sound foreign now know or at least feel they are not welcome in Hazleton.”).

209. *See* Hazleton, Pa., Ordinance 2006-18, at § 4(B)(1) (Sept. 21, 2006), *available at* http://www.smalltowndefenders.com/090806/2006-18%20_Illegal%20Alien%20Immigration%20Relief%20Act.pdf.

210. *See id.* § 4(B)(3).

211. *Id.* § 4(B)(4).

212. *See* BEAUFORT COUNTY, S.C., CODE § 18-69(3)(e)(1) (2007).

213. *Compare* Hazleton, Pa., Ordinance 2006-18, at § 4(B)(1) (stating that a valid complaint must describe the alleged violator and the actions constituting the violation), *with* BEAUFORT COUNTY, S.C., CODE § 18-69(3)(e)(1) (noting that a licensee is subject to license suspension if the licensee fails to provide the requisite documentation upon request).

have to prove that the ordinances were motivated by a discriminatory purpose in order to succeed on an equal protection claim.²¹⁴ In *Lozano*, the court found that the IIRA did not implicate a fundamental right and was therefore subject only to the rational basis test rather than strict scrutiny.²¹⁵ Like the IIRA, LEO was enacted to address the problem of the unlawful employment of illegal aliens. Both ordinances note in their Findings and Declaration of Purpose sections that the unlawful employment of illegal aliens “harms the health, safety and welfare” of the local citizens.²¹⁶ To address these findings, both ordinances view the measures enacted as prohibiting and deterring activities that further the employment of unauthorized aliens.²¹⁷ *Lozano* found that Hazleton’s goals and policies were rationally related,²¹⁸ and there is no reason why the same would not be true of Beaufort County’s LEO as well.

V. CONCLUSION

Forecasting the long-term repercussions *Lozano* will have on proposed immigration reforms is a difficult task. On the one hand, the decision likely will slow the wave of efforts led by local officials that rushed to solve the immigration problem on their own. Numerous counties and municipalities around the country, many of whom modeled local immigration ordinances after Hazleton, are already withdrawing or repealing their attempts to regulate immigration at the local level.²¹⁹ Not only does *Lozano* indicate a possibility that a local ordinance may not be upheld in court,²²⁰ but the threat of being tapped with the legal costs associated with

214. See *supra* notes 116–17 and accompanying text.

215. See *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 542 (M.D. Pa. 2007) (“[O]ur equal protection analysis must only explore whether [the] IIRA has ‘a rational relationship to a legitimate state interest.’” (quoting *Kranson v. Valley Crest Nursing Home*, 755 F.2d 46, 53 (3d Cir. 1985))).

216. See Hazleton, Pa., Ordinance 2006-18, at § 2(C) (“[U]nlawful employment . . . of illegal aliens . . . harm[s] the health, safety and welfare of authorized US workers and legal residents in the City of Hazleton.”); Beaufort County, S.C., Ordinance 2006/31, at § 1(B)(2) (Dec. 27, 2006), *available at* <http://www.bcgov.net/news/Illegal%20Immigration%20Relief%20Act/31%20Lawful%20Employment.pdf> (“The employment of unauthorized aliens harms the health, safety and welfare of persons authorized to work in Beaufort County . . .”).

217. See Hazleton, Pa., Ordinance 2006-18, at § 2(D) (“[T]he City of Hazleton is . . . empowered and mandated by the people of Hazleton to abate the nuisance of illegal immigration by diligently prohibiting the acts and policies that facilitate illegal immigration”); Beaufort County, S.C., Ordinance 2006/31, at § 1(B)(4) (finding that the ordinance will “deter and prevent employment of unauthorized aliens”). The two ordinances vary slightly in their terminology. The Hazleton ordinance uses the term “unlawful worker,” which it defines to mean “a person who does not have the legal right or authorization to work due to an impediment in any provision of federal, state or local law, including but not limited to . . . an unauthorized alien as defined by United States Code Title 8, subsection 1324a(h)(3).” Hazleton, Pa., Ordinance 2006-18, at § 3(E). Beaufort County does not use the term “unlawful worker” but instead uses “unauthorized alien” and adopts the definition given by 8 U.S.C. § 1324a(h)(3) (2000). See BEAUFORT COUNTY, S.C., CODE § 18-69(1)(a)(7). Section 1324a(h)(3) defines “unauthorized alien” to mean an alien who, at the time of employment, is not either “(A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.” 8 U.S.C. § 1324(h)(3).

218. See *supra* notes 116–17 and accompanying text.

219. See Belson & Capuzzo, *supra* note 14 (noting that a “growing list of municipalities nationwide” are reconsidering laws that penalize the employment of illegal immigrants).

220. See Conley & Rosenberg, *supra* note 11, at 40 (suggesting that ordinances similar to Hazleton’s “presumably are doomed to the same fate” as the IIRA).

defending the ordinances from potential legal challenges is enough to make most small-budget municipalities think twice.²²¹ In addition to Hazelton, several cities have received national attention for legal challenges to their ordinances.²²² Given the fact that the ACLU opposes these attempts to set and enforce immigration policies at the local level,²²³ presumably, the ACLU and similar organizations will continue litigating all ordinances that resemble the Hazelton model.

On the other hand, *Lozano* probably will not serve as a complete deterrent to local reforms. The City of Hazelton has already filed an appeal with the United States Court of Appeals for the Third Circuit, and the mayor of Hazelton has vowed to appeal the case all the way to the Supreme Court.²²⁴ Moreover, the district court's ruling is binding only in Pennsylvania,²²⁵ and there is no guarantee that a South Carolina court or the Fourth Circuit will find *Lozano* persuasive.

In South Carolina, the effects of *Lozano* could extend much further than just to Beaufort County. Cities and counties across the state maintained a watchful eye on Beaufort County as LEO was drafted²²⁶ and will continue to observe its implementation.²²⁷ In addition to Beaufort County, Pickens County,²²⁸ Dorchester County,²²⁹ and the City of Clemson²³⁰ have all passed or begun consideration of immigration-related ordinances. The local immigration reforms are not limited to South Carolina's counties and municipalities. The state legislature has also begun to take action that would further regulate illegal immigration on a state level,²³¹ and

221. See Milan Simonich, *Attorneys Want Hazelton to Pay Fees: Small Town Fights Back, Appeals Ruling that Its Immigration Laws Were Unconstitutional*, PITT. POST-GAZETTE, Sept. 5, 2007, at B3, available at <http://www.post-gazette.com/pg/07248/814665-85.stm> (reporting that the thirty-seven attorneys who assisted the plaintiffs in *Lozano* are now asking Hazelton to pay their attorney fees of nearly \$2.4 million).

222. See Belson & Capuzzo, *supra* note 14 (reporting on recent litigation over similar ordinances in Farmers Branch, Texas; Valley Park, Missouri; and Riverside, New Jersey).

223. See ACLU, LOCAL ANTI-IMMIGRANT ORDINANCE CASES, <http://www.aclu.org/immigrants/discrim/27848res20070105.html> (last visited Feb. 27, 2008).

224. See Conley & Rosenberg, *supra* note 11, at 40.

225. See *id.*

226. See Phillips, *supra* note 123 ("Counties across South Carolina are watching as Beaufort forges into territory long left to the federal government.").

227. See Jeremy Hsieh, *Audits to Find Illegal Workers Will Proceed*, BEAUFORT GAZETTE (S.C.), June 29, 2007, at 1A (reporting that the Beaufort County Council intends to proceed with "[m]ass audits of Beaufort County businesses to root out illegal workers").

228. See Scott Keeler, *Pickens Council Takes Step to Halt Hiring of Illegals*, GREENVILLE NEWS (S.C.), Sept. 18, 2007, at 2A (reporting that the Pickens County Council voted to begin drafting an ordinance that would prevent businesses from hiring illegal immigrants).

229. See Phillips, *supra* note 123 (reporting that Dorchester County has begun debating an ordinance modeled after the ordinance originally proposed in Beaufort County).

230. See Anna Simon, *Tensions Rise over Immigration Plan in Clemson*, GREENVILLE NEWS (S.C.), July 3, 2007, at 1A (reporting that the Clemson City Council is considering a proposed ordinance that would prohibit the city from doing business with any entity that knowingly hires illegal aliens).

231. Governor Sanford has already signed into law South Carolina Senate Bill 449, declaring that "[t]he State shall not participate in the implementation of the federal REAL ID Act." See Act of June 13, 2007, No. 70, § 1, 2007 S.C. Acts 295, 295 (to be codified at S.C. CODE ANN. § 56-1-85). The senate adopted a resolution requesting that the Governor issue an executive order declaring that the Department of Social Services or any other state agency may not provide any services or assistance to illegal aliens. See S. Res. 531, 117th Leg., Reg. Sess. (S.C. 2007), available at http://www.scstatehouse.net/sess117_2007-2008/prever/531_20070307.htm. In addition, there are several bills pending in the South Carolina legislature, such as the "South Carolina Illegal Immigration Reform Act," that would create statewide immigration laws, the passage of which may have direct

the General Assembly's agenda for the 2008 session likewise appears to be focused heavily on immigration.²³²

What *is* clear is that municipalities and counties across the state, as well as South Carolina's legislature, must proceed cautiously and carefully should they decide to regulate immigration on the local level.²³³ While federal legislation does seem to provide some avenues for enforcement at the local level, states and cities must consider constitutional issues like federal preemption and avoid legislation that is beyond the scope of their governing authority. Enforcement of these laws must comport with the Due Process Clause, giving proper notice and the opportunity to be heard. Should such a law be challenged, the court will scrutinize the governing body's actions carefully to determine whether the law was enacted with discriminatory intent in violation of the Equal Protection Clause. Failure to consider these issues will likely result in the same judicial annulment that befell Hazleton, Pennsylvania—a fate local governments in South Carolina surely wish to avoid. While attempting to reform immigration from the ground up may seem superior to any reform the federal government enacted, *Lozano* may in fact signal that local immigration regulation efforts will go to a far better rest than its opponents could have ever known.

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effects on local ordinances. See S. 392, 117th Leg., Reg. Sess. (S.C. 2007) (referred to H. Comm. on the Judiciary, Apr. 24, 2007), *available at* http://www.scstatehouse.net/sess117_2007-2008/prever/392_20070420.htm.

232. See Noelle Phillips, *Immigration Tops List: Lawmakers Line Up Bills to Regulate Illegal Immigration; Critics Say It Is Federal Issue*, STATE, Jan. 6, 2008, at A1 (reporting that there are currently at least thirty-five bills regarding immigration up for consideration in the 2008 session).

233. In addition to implementing local immigration reforms, states, cities, and special interest groups should lobby Congress for an amendment to IRCA's preemption clause that would clarify the "licensing and similar laws" provision in order to ensure that their efforts are not preempted by federal law. While Congress may not be able to pass any comprehensive immigration reform, a simple amendment to the preemption clause in IRCA would allow cities and municipalities more leeway and provide them with more authority to enforce federal laws on a local level. Through the power of local enforcement, more cities would be able to act in enforcing the federal immigration system currently in place.